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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD,
a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

1. Whether a state constitutional provision which, on its face, imposes unique obstacles to judicial relief from racial segregation in violation of state law, placing no analogous obstacles in the path of judicial relief from other state law violations, may be upheld solely because the provision "embraces the protection of the Fourteenth Amendment."

2. Whether proof of such a provision's racially discriminatory purpose and effect may be disregarded solely because racially neutral purposes recited in the provision itself "could have been" among the motives that led to the provision's adoption.

LIST OF PARTIES

The list of parties was set out in the Petition for Writ of Certiorari on page ii. Per Rule 28.1 of this Court, the list is not repeated here.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
PETITIONERS' BRIEF	1
OPINIONS AND JUDGMENTS BELOW	1
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	30
ARGUMENT	34
I. ON ITS FACE, PROPOSITION 1 EMBODIES AN IMPERMISSIBLE RACIAL CLASSIFICATION	34
A. Proposition 1 Interposes Race-Specific Obstacles to State Judicial Relief	34
B. Proposition 1 Serves No Compelling Governmental Interest	54

Page

II. IN ITS PURPOSE AND EFFECT, PROPOSITION 1 INVIDIOUSLY DISCRIMINATES AGAINST RACIAL MINORITIES 64

A. Discriminatory Purpose May be Inferred From the Totality of Relevant Facts 64

B. Racial Considerations Played a Role in the Enactment of Proposition 1 69

1. Impact 71

2. Sequence of Events 80

3. Procedural and substantive departures from the norm in connection with the decision or action 83

4. Legislative history 88

C. The Motivating Role of Race Was Decisive 91

CONCLUSION 96

APPENDIX

The 18-Year History of School Desegregation Litigation in Los Angeles A-1

TABLE OF AUTHORITIES

Page

Cases

Abella v. Riverside Unified School District
65 Cal.App.3d 153, 135 Cal.Rptr. 177 (1976) 46

Amador Valley Joint Union High School Dist. v. State Board of Equalization
22 Cal.3d 209, 583 P.2d 1281, 149 Cal.Rptr. 239 (1978) 41

Anderson v. Martin
375 U.S. 399 (1964) 50

Anderson v. Thompson
495 F.Supp. 1256 (E.D.Wis. 1980) 45

Arlington Heights v. Metropolitan Housing Development Corp.
429 U.S. 252 (1977) 67, 69-71, 80, 83, 88, 90, 92, 95

Arthur v. Nyquist
473 F.Supp. 830 (W.D.N.Y. (1979) 76

Boddie v. Connecticut
401 U.S. 371 (1971) 52, 87

Brown v. Board of Education
347 U.S. 483 (1954) 8, 10, 66

Page

Burton v. Board of Education
71 Cal.App.3d 52,
139 Cal.Rptr. 383 (1977) 46

Calder v. Bull
3 U.S. (3 Dall.) 386 (1798) 85

Cisneros v. Corpus Christi
Independent School District
467 F.2d 142
(5th Cir. 1972) 76

Columbus Board of Education v.
Penick
443 U.S. 449 (1979) 22, 66, 93

Committee to Defend Reproductive
Rights v. Myers
29 Cal.3d 252, 625 P.2d 779,
172 Cal.Rptr. 886 (1981) 47

Cooper v. Aaron
358 U.S. 1 (1958) quoting
Buchanan v. Warley
245 U.S. 60 (1917) 63

Crawfold v. Board of Education
(Crawford I) 12-14
17 Cal.3d 280, 27, 38
551 P.2d 28, 62, 76
130 Cal.Rptr. 724 (1976) 77, 84

Crawford v. Board of Education 27-29
(Crawford II) 34, 36, 38
113 Cal.3d 633, 45, 55, 71, 76
170 Cal.Rptr. 495 (1980) 77, 94, 95

Page

Dayton Board of Education v. Brinkman (Dayton I) 433 U.S. 406 (1977) 93

Dayton Board of Education v. Brinkman (Dayton II) 443 U.S. 526 (July 2, 1979) 22, 93

Downey, In re 72 Misc.2d 772, 340 N.Y.S.2d 687 (1973) 46

Edwards v. California 314 U.A. 160 (1941) 97

Elliott v. Board of Education 64 Ill.App.3d 229, 380 N.E.2d 1137 (1978) 45

Estes v. Metropolitan Branches, Dallas NAACP 444 U.S. 437 (1980) 29, 94

Evans v. Buchanan 435 F.Supp. 832 (D.Del. 1977) 76

Friends of Mammoth v. Board of Supervisors 8 Cal.3d 247, 502 P.2d 1049, 104 Cal.Rptr. 761 (1972) 41

Garnet Valley School District v. Hanlon 15 Pa.Commw.Ct. 476, 327 A.2d 215 (1975) 46

Guaranty Trust Co. v. Blodgett 287 U.S. 509 (1933) 35

Page

Hampton v. Mow Sun Wong
426 U.S. 88 (1976) 71

Hunter v. Erickson 28, 31
393 U.S. 385 (1969) 49, 51, 70

J.F., Matter of
91 Misc.2d 445,
398 N.Y.S.2d 125 (1977) 46

Jackson v. Pasadena City School District
59 Cal.2d 876, 382 P.2d 878, 10, 11
31 Cal.Rptr. 606 (1963) 13, 84

Jefferson v. Hackney
406 U.S. 535 (1972) 70, 92

Keyes v. School District No. 1 Denver, Colorado
413 U.S. 189 (1973) 66

Kingsley Int'l Pictures Corp. v. Regents
360 U.S. 684 (1959) 35

Lee v. Nyquist
402 U.S. 935 (1972) aff'g
318 F.Supp. 710 (W.D.N.Y. 49, 50
1970) 64, 70

Little v. Streater
___ U.S. ___, 101 S.Ct. 2202,
68 L.Ed.2d 627 (1981) 87

Loving v. Virginia
388 U.S. 1 (1967) 66

Page

Manjares v. Newton
64 Cal.2d 365, 411 P.2d 901,
49 Cal.Rptr. 805 (1966) 46

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803) 86

Martin v. Charlotte-Mecklenberg
Board of Education
475 F.Supp. 1318 (W.D.N.C. 1979) 76

McLaughlin v. Florida
379 U.S. 184 (1964) 54, 57

Memorial Hospital v. Maricopa
County
415 U.S. 250 (1974) 58, 63

Memphis v. Greene
___ U.S. ___, 101 S.Ct. 1584,
67 L.Ed.2d 769 (1981) 70

Myers v. Arcata Union High
School District
269 Cal.App.2d 549,
75 Cal.Rptr. 68 (1969) 46

NAACP v. Button
371 U.S. 415 (1963) 51

NAACP v. Lansing Board of
Education
559 F.2d 1042 (6th Cir.
1977) aff'g 429 F.Supp.
583 (W.D. Mich. 1976) 76

North Carolina Board of
Education v. Swann
402 U.S. 43 (1971) 59

Page

Payne v. Superior Court
17 Cal.3d 908, 553 P.2d 565
132 Cal.Rptr. 405 (1976) 87

People ex rel. Schuldt v.
Schimanski
103 Ill.App.2d 780,
266 N.E.2d 409 (1971) 46

People v. Ramirez
25 Cal.3d 260, 599 P.2d 622,
158 Cal.Rptr. 316 (1979) 47

Personnel Administration of
Massachusetts v. Feeney 53, 72
442 U.S. 256 (1979) 92, 95

Pinkerton v. Moye
509 F.Supp. 107 (W.D.Va. 1981) 45

PruneYard Shopping Center v.
Robins
447 U.S. 74 (1980) aff'g
23 Cal.3d 899, 592 P.2d 341,
153 Cal.Rptr. 854 (1979) 48, 55

Railroad Commission v. Pullman
313 U.S. 496 (1941) 35

Reed v. Rhodes
607 F.2d 717 (6th Cir.
1979) aff'g 455 F.Supp.
569 (N.D.Ohio 1978) 76

Regents of the University of
California v. Bakke
438 U.S. 265 (1978) 55, 79

Page

Reitman v. Mulkey
387 U.S. 369 (1967) 66, 90

Sail'er Inn, Inc. v. Kirby
5 Cal.3d 1, 485 P.2d 529
95 Cal.Rptr. 329 (1971) 47

San Francisco Unified School
District v. Johnson
3 Cal.3d 937, 479 P.2d 669,
92 Cal.Rptr. 309 (1971) 10

Sanders v. Pacific Gas &
Elec. Co.
53 Cal.App.3d 661
126 Cal.Rptr. 415 (1975) 41

Santa Barbara School District v.
Superior Court
13 Cal.3d 315, 530 P.2d 605
118 Cal.Rptr. 637 (1975) 11

Seattle School Dist. No. 1, Etc.
v. State
473 F.Supp. 996 (W.D.Wash.
1979) aff'd in part and
rev'd in part, 633 F.2d
1338 (9th Cir. 1980), prob.
jur. noted, 50 U.S.L.W.
3278 (U.S. Oct. 13, 1981) 85

Serrano v. Priest
5 Cal.3d 584, 487 P.2d 1241,
96 Cal.Rptr. 601 (1971) 47

Serrano v. Priest
18 Cal.3d 728, 557 P.2d 929,
135 Cal.Rptr. 345 (1976) 47

Page

Shapiro v. Thompson
394 U.S. 618 (1969) 58

Shrewsbury v. Board of Education
265 S.E.2d 767 (W.Va. 1980) 46

Silver, In re
79 Misc.2d 247,
359 N.Y.S.2d 851 (1974) 46

Smiley v. Kansas
196 U.S. 447 (1905) 35

Swann v. Charlotte-Mecklenburg
Board of Education
402 U.S. 1 (1971) 64

Tancil v. Woolls
379 U.S. 19 (1964) 70

Thomason v. County of Suffolk
66 Misc.2d 926,
332 N.Y.S.2d 762 (1971) 46

Trafficante v. Metropolitan Life
Insurance Co.
409 U.S. 205 (1972) 36

United States v. Carolene
Products Co.
304 U.S. 144 (1938) 50

United States v. Klein
80 U.S. (13 Wall.) 128 (1871) 85

Vlandis v. Kline
412 U.S. 441 (1973) 71

Page

Ward v. Flood
48 Cal. 36, 17 Am.Rep. 405 (1874) 9

Washington v. Davis
426 U.S. 229 (1976) 65, 70-72 92, 95

Wright v. Council of City of Emporia
407 U.S. 451 (1972) 78

Statutes

California Code of Civil Procedure:

§ 367 88

§ 369 88

§ 1062(a) 88

§ 1179(a) 88

California Education Code:

§ 1009.5 10

§ 1009.6 11

§§ 8803 and 8004 10

§§ 35350 and 35351 11

§§ 72209 and 72210 12

California 1872 Political Code
§§ 1662 and 1669 9, 10

Page

Statutes of California:

1863, Ch. CLIX, § 68, 210 9

1863-1864, Ch. CCIX, § 13, 213 9

1865-1866, Ch. CCCXLII, §§ 57 58 & 59, 398 9

1867-1870, Ch.DLVI, § 56, 839 9

1947, Ch. 737 10

28 U.S.C. § 1257(3) 3

Constitution

California Constitution, Art. I, § 7(a) 3, 4, 7

United States Constitution, 14th Amendment, § 1 passim

Newspapers

Los Angeles Times:

January 18, 1979 81

February 5, 1980, § I at 3 22, 23

April 11, 1980, § I at 3 22, 23

Richmond Independent, January 14, 1979 81

Page

Texts

Cloud, R., Education in California, 1952 — 8

Comment, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause, 10 Golden Gate U.L. Rev. 611 (1980) — 21, 23

Comment, Proposition 1 and Federal Protection of State Constitutional Rights, 75 Nw. U.L. Rev. 685 (1980) — 23

Ely, J. H., Democracy and Distrust, 73-104 (1980) — 50

Ferrier, W., Ninety Years of Education in California -- 1846 to 1936 (1937) — 8

Hendrick, I., The Education of Non-Whites in California, 1849-1970 (1977) — 8

Orfield, Must We Bus, 116-17 (1978) — 92

Pollard, How to Win Enemies and Influence People, Cal.J. 301 (Sept. 1979) — 23

Poussaint, "Education and Black Self-Image," Freedomways (Fall 1968) — 76

Page

Reams, B., & P. Wilson, eds., Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws 1865-1953; Prepared for United States Supreme Court in re: Brown v. Board of Education of Topeka, 34-53 (1975) 8

Sears, D.O., C.P. Hensler, and L.K. Speer, "Whites' Opposition to Busing: Self-Interest or Symbolic Politics?," 73 American Political Science Review, 139-51 (1980) 92

50 U.S.L.W. 3278 30

Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975 (1976) 8

Miscellaneous

California Proposition 1, November 6, 1979 passim

California Proposition 21, § 1 11

California Senate Bill 217 19, 20

California Senate Bill 1244 22

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PETITIONERS' BRIEF

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the court below are reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), see cert. pet. 1A-71A.

Other reported opinions in previous phases of the case are reported at 448

U.S. 1343, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980); 439 U.S. 1380 and 1384, 58 L.Ed.2d 88 and 92, 99 S.Ct. 40 and 44 (1978); 17 Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976); 69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 19, 1980. Petition for rehearing was denied on January 14, 1981.

Petition for hearing in the California Supreme Court was denied on March 11, 1981.

By order dated June 1, 1981, Mr. Justice Rehnquist granted an extension of time to July 9, 1981, within which to petition for certiorari.

The petition was filed on July 8, 1981. It was granted on October 13, 1981.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution which states in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, Section 7(a), as amended by Proposition 1 on November 6, 1979, states:

ARTICLE 1. DECLARATION OF RIGHTS

§7. Due process and equal protection; pupil school assignment and transportation

(a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws; [*] provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation. (1) except to remedy a specific violation by such party that of the Equal Protection Clause of the 14th Amendment to the United

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[*] What follows is the amendment, Proposition 1.

States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

STATEMENT OF THE CASE

Proposition 1, enacted by California voters in a special state-wide election on November 6, 1979, amends the state

equal protection clause -- Article I, §7(a) of the California Constitution -- to "limit the power of California courts to require desegregation." [1]

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[1] This quotation is from the "Analysis by Legislative Analyst" contained in the official California Ballot Pamphlet, mailed by state election officials to all Califonia voters prior to the election. After reminding the voters that the California Supreme Court had interpreted the state constitution to grant broader school desegregation remedies than the federal Constitution provides, the analysis explained the effect of Proposition 1:

> Specifically, desegregation could be required only in cases where the U.S. Constitution would require it. As a result, the proposition could affect 13 school districts which now have desegregation plans ordered or approved by a California court plus other school districts that are involved or could become involved in desegregation actions before California courts.
>
> J.A. 260.

At the time Proposition 1 was adopted, [2] respondent Board of Educa-

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[2] Proposition 1 is the most recent in a long series of official acts to create and maintain racial segregation in the California public schools. The state's early history of official school segregation covers nearly a century: from the legislative enactment of school segregation laws shortly after the state's admission into the union in 1850, through its refusal to ratify the Fourteenth Amendment in 1868, and ultimately to the repeal of its segregation laws in 1947. See B. Reams & P. Wilson, eds., Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws 1865-1953; Prepared for United States Supreme Court in re: Brown v. Board of Education of Topeka, 34-53 (1975). Other sources on California's history of official segregation include: I. Hendrick, The Education of Non-Whites in California, 1849- 1970 (1977); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975 (1976); R. Cloud, Education in California (1952); W. Ferrier, Ninety Years of Education in California -- 1846 to 1936 (1937). In the years after **Brown v. Board of Education**, 347 U.S. 483 (1954), California altered its posture from one of requiring segregation to one of officially barring school desegregation.
(continued)

tion of the City of Los Angeles was

The state's first formal segregation law, enacted in 1863, barred "Negroes" and other minorities from the regular public schools, provided for withdrawal of state funds from non-complying school districts, and allowed the establishment of separate schools for minorities. Other school segregation statutes followed. Statutes of California, 1863, Ch. CLIX, §68, 210. Statutes of California, 1863-1864, Ch. CCIX, §13, 213; Statutes of California, 1865-1866, Ch. CCCXLII, §§57, 58 & 59, at 398; Statutes of California, 1867-1870, Ch. DLVI, §56, at 839. The 1872 Political Code of California provided, in §1662:

> Every school unless otherwise provided by special statute, must be open for the admission of all white children between 5 and 21 years residing in the district.

Section 1669 of that Code declared:

> The education of children of African descent and Indian children must be provided for in separate schools.

Separate but equal education was upheld by the California Supreme Court in **Ward v. Flood**, 48 Cal. 36, 17 Am.Rep. 405 (1874), and further segregation statutes ensued. Later "children of Mongolian or Chinese descent" were relegated to (continued)

under a state trial court order, entered

separate schools, Political Code §1662, as amended; in 1909 Indian and Japanese children were similarly segregated. Education Code §§8803 and 8004. The state segregation laws were not repealed until 1947. Statutes of California, 1947, Ch. 737.

After **Brown** and **Jackson v. Pasadena City School District**, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963) (California Constitution requires local school districts to desegregate regardless of the cause of segregation), California began to adopt laws which barred desegregation.

In response to mandatory school desegregation proposals volunteered in 1969 by the San Francisco Unified School District, the California Legislature in 1970 enacted Education Code §1009.5 which provided that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or the guardian."

The California Supreme Court held that if this language were interpreted to bar transportation and assignment for desegregation, it would be unconstitutional. **San Francisco Unified School District v. Johnson**, 3 Cal.3d 937, 479 P.2d 669, 92 Cal.Rptr. 309 (1971). The court explained that "exorcising a (continued)

in 1970 and affirmed by a unanimous

method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools, necessarily legislates the preservation of racial imbalance. It therefore violates constitutional imperatives." Id. at 943.

In 1972, in response to the California Supreme Court's decision in **Johnson** as well as to the Superior Court's decision in this case requiring desegregation in Los Angeles, State Assemblyman Floyd Wakefield of Los Angeles successfully led an initiative campaign for an anti-desegregation measure known as Proposition 21. Section 1 of Proposition 21, which added §1009.6 to the State Education Code, stated: "no public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." In **Santa Barbara School District v. Superior Court**, 13 Cal.3d 315, 324, 530 P.2d 605, 118 Cal.Rptr. 637 (1975), the state Supreme Court held that §1009.6 was "unconstitutional in the same manner and for the same reasons set forth by us in **Johnson**."

When the state Education Code was re-organized in 1976 (Cal. Stats. 1976, Ch. 1010), §§1009.5 and 1009.6 were re-enacted (as §§35350 and 35351, respectively) despite the Supreme Court's narrow interpretation of §1009.5 and its invalidation of §1009.6. Similar (continued)

California Supreme Court in 1976, to desegregate its separate and inferior minority segregated schools. 3/ In **Crawford v. Board of Education,** 17

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statutes were enacted at that time to cover community colleges in addition to elementary and secondary schools. Education Code §§72209, 72210.

For a summary of California's history of official segregation in matters other than public education, see Cert. Pet. App. G at 94A-104A.

3/ In its 1970 decision the California Superior Court found that the Los Angeles Board of Education had "knowingly, affirmatively, and in bad faith . . . segregated, de jure, its students." **Crawford I,** 17 Cal.3d at 288; J.A. 42. The court also found that "the plant, teachers, physical facilities and curriculum at . . . minority segregated schools are in fact of poorer quality than the plant, teachers, physical facilities and curriculum at its predominantly white schools." J.A. 37. The court ordered the Board to desegregate its schools. J.A. 139.

A brief history of this 18-year litigation to desegregate the Los Angeles public schools is provided in an Appendix to this brief.

Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976) (**Crawford I**), the Supreme Court reaffirmed its holding in **Jackson v. Pasadena City School District**, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that regardless of the cause of racial segregation in the public schools, that segregation in and of itself violates the California Constitution. The court squarely rejected the federal rule that school desegregation plaintiffs must show official intent to segregate in order to prevail. 17 Cal.3d at 289-302. The Supreme Court made it clear that the Los Angeles Board of Education was required, not merely to open its predominantly white schools to racial and ethnic minorities who attended minority segregated schools, but also to desegregate the minority

segregated schools themselves. Id. at 303. [4]

On remand, the Board first presented a partial, part-time desegregation plan that was rejected by the Superior Court as insufficient. J.A. 147, 327. The Board then proposed a limited plan, Plan II, that was accepted by the Superior Court as a first step toward compliance with the mandate. J.A. 173 [5] The plan, which involved about seven per cent of

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[4] Under **Crawford** I, local school boards in California are required to "take reasonable and feasible steps to eliminate segregated schools, i.e., schools in which the minority student enrollment is so disproprotionate as realistically to isolate minority students from other students . . . ." Id. at 303.

[5] The court held Plan II "patently" insufficient to constitute full compliance with **Crawford** I and ordered the Board to return with appropriate modifications. J.A. 172, 178.

the district's students in its mandatory portions, went into effect in the fall of 1978. Two months later, in November 1978, a panel of experts appointed by the Superior Court recommended inter-district (metropolitan) desegregation as the most feasible means of assuring long-term desegregation of racially segregated minority schools in Los Angeles. 6/

In December 1978, within three months of these two occurrences -- the onset of initial desegregation and the suggestion of an interdistrict plan -- State

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6/ **See** Reports of Dr. Robert Crain, Exh. II - 360 at 62-63; Dr. Reynolds Farley, Exh. II - 354 at viii; Elwood A. Hain, Jr., Esq., Exh. II-358 at 3-4; Dr. Gary Orfield, Exh. II-359 at 4, 15, 44, 65, 82-83, 86-93, 94, 99; Dr. Thomas Pettigrew, Exh. II-553 at 144-45, 149-52, 156, 164-65 (80 R.T. 11624).

Senator Alan Robbins, of the predominantly white San Fernando Valley section of Los Angeles, authored two measures which were adopted by the California Legislature: a proposed constitutional amendment known as Proposition 1 that would prevent state courts from ordering mandatory student assignment unless federal as well as state rights to equal educational opportunity had been violated, and a law requiring a special state-wide election for the purpose of adopting Proposition 1 without delay. J.A. 194, 211, 214, 215, 218.

As described in the official California Ballot Pamphlet, Proposition 1 was designed principally to accomplish two purposes: (1) rescission of existing state court orders to desegregate minority schools which were segregated

in violation of the California Constitution, especially the trial court's 1970 order for mandatory assignment in Los Angeles; and (2) prevention of future such orders based on the state constitution. J.A. 260, 261.

The "Analysis by Legislative Analyst" contained in the ballot pamphlet stated both that the amendment curtails judicial power to order student transportation and assignment to achieve desegregation and that it applies to all state desegregation cases, regardless of whether plaintiffs have already obtained a judgment and a remedial order for mandatory student assignment. 7/

Proposition 1 was Senator Robbins' fourth attempt to place a similar

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7/ See footnote 1, supra, page 1.

initiative before the voters. [8] In the two years preceding it, he had introduced two measures which passed the Senate but expired in the Assembly Judicary Committee, and had led an unsuccessful campaign to secure enough petition signatures to place a constitutional amendment on the state ballot. According to contemporaneous newspaper reports, Proposition 1 gained wider support because a court-ordered desegregation plan had begun in Los Angeles and particularly because the Superior Court's panel of experts had advised the court to consider metropolitan

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[8] First known as State Constitutional Amendment 2, the measure became Proposition 1 on the November 6, 1979 ballot.

relief. 9/ J.A. 196, 200, 201, 203, 204, 208, 213, 236-37.

Following legislative approval of Proposition 1, Senator Robbins introduced Senate Bill 217, authorizing a special state-wide election (at a cost of $12 million) on August 28, 1979, in

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9/ The Senate Education Committee held immediate hearings and, on January 10, 1978, approved Proposition 1 by a 10-1 vote. Sen. Diane Watson, the only black member of the committee and a former member of the Los Angeles school board, dissented. J.A. 199. The amendment passed the Senate and moved to the Assembly Judiciary Committee. On March 14, 1979, the committee approved the amendment. The only dissenting votes were cast by the committee's two black members, Maxine Waters of Los Angeles and Willie L. Brown, Jr. of San Francisco. J.A. 212.

A week later, after a debate marked by expressions of racial antagonism, the amendment passed the full assembly on a 62-17 vote. Dissenting members denounced the measure as an incentive to "racial hostility," J.A. 216, and said it was "racist on its face." J.A. 216-17.

time to prevent Plan II, the on-going court-ordered desegregation program in Los Angeles, from continuing for a second school year if Proposition 1 prevailed. J.A. 213. Although S.B. 217 failed to win Assembly approval in time to permit that election to go forward, the Legislature did approve an amended version of the bill authorizing a special election on November 6, 1979. J.A. 234. [10] On that date [11] Proposi-

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[10] Shortly after enactment of Senate Bill 217, respondent Board of Education expressed its support of the bill, urged the Governor to sign it, and formally endorsed the proposed constitutional amendment:

> RESOLVED, That the Board of Education of the Los Angeles Unified School District hereby supports the Legislature of the State of California in its passage of Senate Bill 217 which will allow the electorate to vote on this extremely important issue; and be it

(continued)

tion 1 was adopted by the voters by a 2-

> FURTHER RESOLVED, That the Board of Education of the Los Angeles Unified School District endorses Senate Constitutional Amendment 2; and be it
>
> FURTHER RESOLVED, That the Superintendent be instructed to arrange a meeting between those members of this Board favoring this resolution and the Governor to urge his signing of S.B. 217 when it reaches his desk.
>
> J.A. 557.

11/ Shortly before the election, proponents of Proposition 1 took the unusual step of seeking clarifications of Proposition 1. See Comment, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause, 10 Golden Gate U.L.Rev. 611, 679 (1980). In response, both the State Attorney General and the Secretary of State issued pulic statements. J.A. 280, 282. The Attorney General explained:

> The persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 and are asking for a "yes" vote.

(continued)

1 margin. 12/

The persons and organizations who favor busing to achieve racial integration in the schools are generally against Proposition 1, and are asking for a "no" vote.

J.A. 280-81.

12/ On July 19, 1979, shortly after this Court's opinions in **Columbus Board of Education v. Penick**, 443 U.S. 449 (July 2, 1979) and **Dayton Board of Education v. Brinkman**, 443 U.S. 526 (July 2, 1979) (**Dayton II**), Sen. Robbins introduced S.B. 1244 in the California Legislature. The bill provided that plaintiffs seeking "pupil school assignment or pupil transportation in order to enforce any provision of the California Constitution" would bear the burden of proof of all facts necessary to obtain that relief throughout the litigation. The bill further described its provisions as "necessary for the immediate preservation of the public peace" because in the event Proposition 1 was adopted "it can reasonably be anticipated that substantial and immediate litigation will result." J.A. 306. The bill was therefore to take effect immediately.

Although the Legislature passed the bill, the Governor vetoed it on the ground that it was unconstitutional. Los Angeles Times, Feb. 5, 1980, §I, at (continued)

One month earlier, the Superior Court had convened hearings on Plan IV, [13] a

3; id., April 11, 1980, §I, at 3.

The immediate sequence of events leading to the adoption of Proposition 1 is set forth in greater detail in J.A. 194-246. See also Comment, supra, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause, 10 Golden Gate U.L. Rev. 611 (1980); Comment, Proposition 1 and Federal Protection of State Constitutional Rights, 75 Nw. U.L. Rev. 685 (1980). Cf. Pollard, How to Win Enemies and Influence People, Cal. J. 301 (Sept. 1979).

[13] In March 1979, in response to the court's order to modify and strengthen Plan II, J.A. 172, 178, the Board had submitted Plan III, a reduced version of Plan II that continued to use mandatory reassignment. Exhs. II-3 through II-8; 3 R.T. 378. In May 1979, the Board president -- a supporter of Plan III -- was recalled. J.A. 255. In an ensuing regular election two other new members were elected to the Board. The new majority sought court approval for proposals to dismantle nearly all the mandatory components of Plan II, withdrew the Board's submission of Plan III, and sought court approval to replace it with an all-voluntary plan (Plan IV). 44 C.T. 13,158.

Board-proposed all-voluntary plan for desegregation of the district. Shortly after passage of Proposition 1, both the Board and private intervenor Bustop, a San Fernando Valley-based organization, requested the court to modify its prior orders to eliminate those portions requiring mandatory reassignment of students for the purpose of desegregation. J.A. 185; Cert. Pet. App. E at 77A. The court deferred ruling on the combined motion until the conclusion of the trial on Plan IV. During the six-month hearings, which ended in April 1980, only petitioners submitted evidence on the issue of whether racial discrimination was a motivating factor in the adoption of Proposition 1.

On May 19, 1980, the trial court denied the Board and Bustop motion,

basing its decision upon the 1970 Superior Court finding, affirmed by the California Supreme Court in 1976, that school segregation in Los Angeles was de jure in nature. Cert. Pet. App. E at 77A-78A. The court declined to rule on the constitutionality of Proposition 1, holding that question "moot" on the ground that the same remedy would be required under both state and federal equal protection clauses. Id. 78A - 80A. The court therefore entered no findings of fact and made no conclusions of law with respect to the motivating factors underlying Proposition 1.

On July 7, 1980, the trial court held that the Board's all-voluntary proposal (Plan IV) failed to meet the state constitutional standard, J.A. 320, and

specifically found mandatory reassignment essential to satisfaction of the mandate. J.A. 459-60. In addition, the court held that a voluntary plan would disproportionately burden racial minorities. J.A. 344. The court issued guidelines, J.A. 433-51, and directed the Board to use those guidelines in developing a desegregation plan involving both mandatory and voluntary components. J.A. 469.

The Board appealed both the May 19 and July 7 orders. J.A. 4. [14/] The Court of Appeal bifurcated the appellate issues, separating Proposition 1 (the May 19 order) from all other matters.

[14/] Petitioners also appealed the July 7 order, J.A. 4, primarily on the ground that the trial court's guidelines precluded desegregation of the district's most racially segregated and isolated minority schools.

J.A. 543. On December 19, 1980, prior to completion of briefing on the non-Proposition 1 issues, the Court of Appeal reaffirmed the Board's duty to desegregate the district's schools under the state constitution and the **Crawford I** mandate regardless of the cause of segregation, held that the trial court's 1970 findings did not support a ruling that intentional segregation had occurred in Los Angeles, upheld the constitutionality of Proposition 1, and vacated the trial court's orders of May 19 and July 7. The Court of Appeal dismissed the remaining issues as moot. **Crawford v. Board of Education,** 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (hereafter cited as **Crawford II**).

The Court of Appeal disposed of petitioners' argument that Proposition 1 constitutes an explicit racial classification in violation of **Hunter v. Erickson**, 393 U.S. 385 (1969), on the sole ground that the amendment "embraces the protection of the Fourteenth Amendment . . . ." **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. The court did not deny that Proposition 1 imposes race-specific burdens. Nor did it address the question whether the Fourteenth Amendment forbids the imposition of those burdens, especially when they prevent racial minorities alone from obtaining remedies necessary to the vindication of state constitutional rights.

Like the trial court, the appellate court made no findings regarding the

intent and effect of Proposition 1. Instead, the Court of Appeal declared that a "sufficient answer" to petitioners' argument that Proposition 1 was passed with discriminatory intent could be found in the proposition itself -- in its recital of racially neutral purposes purportedly underlying the amendment. Id. at 654, 170 Cal.Rptr. at 509. The court further dismissed as "pure speculation" any contention that the amendment was motivated in any part by racial discrimination, stating its "belie[f]" that the proposition "could have been motivated without segregative intent and discriminatory purpose by the considerations" listed in Justice Powell's dissent in **Estes v. Metropolitan Branches, Dallas NAACP**, 444 U.S. 437, 450-51 (1980). **Crawford II**, 113

Cal.App.3d at 655, 170 Cal.Rptr. at 509.

Petition for rehearing was denied on January 14, 1981. Cert. Pet. App. B at 72A. The California Supreme Court denied petitioners' petition for a hearing on March 11, 1981. J.A. 4. This Court granted petitioners' petition for writ of certiorari on October 13, 1981, 50 U.S.L.W. 3278.

SUMMARY OF ARGUMENT

This case is only superficially concerned with the mandatory transportation of students. By amending its constitution so as to withhold the full panoply of otherwise available state court remedies from those -- and only those -- who challenge racial separation

in violation of the state's own laws, the State of California has created not a dual school system (although such a system might be the result) but a dual court system: a first-class judicial system for whites and for problems unrelated to race, and a second-class judicial system, its remedial capacity radically restricted, for minorities and for problems of racial isolation.

Just as this Court in **Hunter v. Erckson**, 393 U.S 385 (1969), condemned a two-track system of lawmaking, under which local laws to combat racial discrimination in housing, however privately caused, were harder to enact than local laws addressing other housing matters, so the Court here should condemn a two-track system of law-enforcement, under which the state's

laws against racial segregation in schooling, however privately caused, are harder to enforce than are the state's laws addressing other schooling questions -- and under which the same policy tool, that of court-ordered pupil assignment or transportation, is rendered less available for purposes of racial integration than for all other purposes.

Even if racial discrimination were not built into the very terms of the state constitutional amendment here challenged, the aims of that amendment undeniably included its most conspicuous and significant effect: the imposition of added burdens upon, and the consequent segregation of, California's minorities. Relying only upon the self-serving announcement of more benign aims

in the amendment's own postcript, the court below failed to apply this Court's directions for uncovering racially discriminatory purposes and invalidating the measures they motivate.

Nothing could be more misleading than to suggest, as did the court below, that a law can escape scrutiny for impermissible racial discrimination, whether on its face or in its purposes and effects, by taking a bow in the direction of the Fourteenth Amendment. Just as a state law restricting minorities, and minorities only, to those rights and privileges already secured to them by the Fourteenth Amendment would blatantly deprive the persons subject to it of the equal protection of the state's own laws, so the state provision at issue here, although of somewhat narrower

compass, violates the state's fundamental duty to govern impartially.

ARGUMENT

I. ON ITS FACE, PROPOSITION 1 EMBODIES AN IMPERMISSIBLE RACIAL CLASSIFICATION

A. Proposition 1 Interposes Race-Specific Obstacles to State Judicial Relief

In the court below, petitioners argued that Proposition 1 employs an "explicitly racial classification." The court's only response was that the provision "embraces the protection of the Fourteenth Amendment and does not seek to violate it." [15] With all respect, that answer is wholly beside the point. There is no doubt that a

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[15] **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508.

state law, even while "embracing" the Fourteenth Amendment with one hand, might transgress its strictures with the other by imposing a race-specific burden upon the vindication of state claims. That is precisely the character of Proposition 1. For, as the court below authoritatively construed that proposition, 16/ it removes "court-ordered public school assignment and tranportation as a remedy available to cure state-proscribed racial imbalance in

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16/ This Court has recognized that it is "bound by the decision of [the state court] as though the meaning as fixed by the court had been expressed in the statute itself in specific words." **Guaranty Trust Co. v. Blodgett**, 287 U.S. 509, 513 (1933); **Kingsley Int'l. Pictures Corp. v. Regents**, 360 U.S. 684, 688 (1959); **Railroad Commission v. Pullman**, 312 U.S. 496, 500 (1941); **Smiley v. Kansas**, 196 U.S. 447, 455 (1905).

public schools." 17/ That rifle-shot removal of a remedy interposes a race-specific barrier to those -- principally racial minorities 18/ who seek to employ

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17/ **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508.

18/ Under the California Constitution, segregated schools are defined "in terms of the isolation of minority students from other students" and the principal focus is on the harm done to racial minorities. **Crawford I**, 17 Cal.3d at 303 n.15. But the Supreme Court also recognized that racially segregated schools "inflict considerable harm on white students and society generally" and that desegregation benefits "all students, both black and white." Id. (citations omitted). Cf. **Trafficante v. Metropolitan Life Insurance Co.**, 409 U.S. 205, 210 (1972) (whites injured by discriminatory housing practices directed against blacks have standing to sue for violation of federal civil rights statute). This case is, of course, not altered by the recognition that whites as well as minorities have a positive stake in racial integration of public schools.

the state's otherwise available governmental apparatus to vindicate their rights under state law.

Proposition 1's very language makes its racially slanted structure and meaning plain. After prohibiting mandatory student assignment in seemingly general terms, Proposition 1 specifies that a school board may nonetheless "voluntarily continu[e] or commenc[e] a school integration plan" after the amendment's effective date. This limited exception renders transparent what the prohibition might otherwise have concealed, or at least obscured: that the amendment is directed solely against, and applies only to, court-ordered student assignment plans for racial integration -- i.e., plans designed to end or reduce

racial separation that persists in the public schools in violation of state constitutional norms left intact by Proposition 1.

It bears emphasis in this connection that "Proposition 1 does not . . . change any substantive law of rights" under the state constitution. 19/ Thus, Proposition 1 does not substitute state approval of neighborhood schools, regardless of racial separation, for state proscription of racially segregated

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19/ **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. See also id. at 655-656, 170 Cal.Rptr. at 509-510 (after Proposition 1, students continue to have the right to attend desegregated schools; "[t]his right, recognized in **Crawford** [I], supra, has not been removed by Proposition 1, which does not purport to change the duty imposed on a school board by California law to take all reasonably feasible steps to alleviate racial segregation in its schools regardless of cause.").

schools, regardless of cause. Leaving the substantive law of California on that subject unchanged, Proposition 1 alters only the availability of traditional remedies to redress violations of that law. That this is the meaning of Proposition 1 is clear not only from its express terms and from the construction given it by the Court of Appeal but also from the explanation offered by the Attorney General [20] and by the

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[20] State Atty. Gen. George Deukmejian's last-minute clarification of the proposition explained that "persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 . . . ." J.A. 280.

legislative analysis 21/ to which California law accords official

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21/ The "Analysis by Legislative Analyst" contained in the official California Ballot Pamphlet focuses exclusively on questions of "segregation" and "desegregation," observing that "This proposition would limit the power of California courts to require desegregation . . . . As a result, the proposition could affect 13 school districts which now have desegregation plans ordered or approved by a California court plus other school districts that are involved or could become involved in desegregation actions before California courts." J.A. 260 Unless segregation was caused by "government action with a discriminatory intent, . . . the proposition would prohibit a California court from ordering the school district to start a pupil school assignment or pupil transportation desegregation plan." J.A. 258, 260. Not a word is said about student assignment or transportation for other purpose.

status. 22/ Indeed, in papers filed with this Court, respondent Board of Education necessarily conceded that Proposition 1 addresses but "one narrow area: the power of a state court to order mandatory student assignment or

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22/ It is settled law in California that the legislative analysis contained in the ballot pamphlet "may be used to interpret an initiative measure." **Sanders v. Pacific Gas & Elec. Co.**, 53 Cal.App.3d 661, 672 & n. 11, 126 Cal.Rptr. 415 (1975) & cases there cited. The legislative analysis should be followed where it narrows and explains the intent of a provision arguably subject to more than one interpretation. See **Amador Valley Joint Union High School Dist. v. State Board of Equalization**, 22 Cal.3d 208, 245-46, 583 P.2d 1281, 149 Cal.Rptr. 239 (1978). And "[o]nce a particular legislative intent has been ascertained, it must be given effect 'even though it may not be consistent with the strict letter of the statute.'" **Friends of Mammoth v. Board of Supervisors**, 8 Cal.3d 247, 259, 502 P.2d 1049, 104 Cal.Rptr. 761 (1972). The same rules of interpretation apply to initiatives. **Sanders**, 53 Cal.App.3d at 672.

transportation as a desegregation remedy. 23/

The race-specific barrier created by Proposition 1 is manifested in four related ways: institutional, remedial, substantive, and temporal. All four reveal major obstacles that Proposition 1 interposes only where the wrong complained of involves racial separation or isolation -- segregation of students by race in the public schools. Specifically:

1. As an institutional matter, it is only with respect to racial separation that those urging the adoption of a pupil assignment or transportation plan to achieve

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23/ Brief in Opposition to Petition for Writ of Certiorari, at 9 (emphasis added).

ends mandated under state but not federal law must proceed without the aid, however necessary, of the state's judiciary;

2. As a remedial matter, it is only with respect to racial separation that those invoking state judicial assistance to vindicate rights secured by state but not federal law must proceed without resort to the remedial device of pupil assignment or transportation, however vital to the vindication of such rights;

3. As a substantive matter, it is only with respect to racial separation that those seeking relief through court-ordered pupil assignment or transportation, however indispensable to

the vindication of their claims, must show an independent federal right to such relief under the Fourteenth Amendment; and

4. As a temporal matter, it is only with respect to racial separation that those who have secured state judicial vindication of their claims through pupil assignment or transportation remedies must be prepared perpetually to defend the relief obtained against challenge "by any interested person."

Thus, when the California Constitution was amended to single out for special limitation what the court below identified as "the arsenal of techniques available to a state court to alleviate

racial school segregation," 24/ the State of California left that arsenal unencumbered by any parallel limitation in applying the same techniques to other problems, even with the aid of the state's courts; 25/ or in vindicating

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24/ **Crawford II**, 113 Cal.App.3d at 651, 170 Cal.Rptr. at 507.

25/ Proposition 1 is directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegregating the public schools. Mandatory student assignment for any other purpose -- such as relieving overcrowded schools or fulfilling the educational rights of handicapped children -- remains untouched.

Courts have ordered student assignment or transportation for a variety of purposes, including assistance to handicapped children, **Pinkerton v. Moye**, 509 F.Supp. 107 (W.D.Va. 1981); **Anderson v. Thompson**, 495 F.Supp. 1256 (E.D.Wis. 1980); **Elliott v. Board of Education**, 64 Ill.App.3d 229, 380 N.E.2d 1137 (1978) (Chicago school board must provide transportation for handicapped students where necessary to implement their state constitutional right to equal educational opportunities); **Matter of J.F.**, 91 (continued)

other rights protected more fully under

Misc.2d 445, 398 N.Y.S.2d 125 (1977); **In re Silver**, 79 Misc.2d 247, 359 N.Y.S.2d 851 (1974); **In re Downey**, 72 Misc.2d 772, 340 N.Y.S.2d 687 (1973); **Thomason v. County of Suffolk**, 66 Misc.2d 926, 332 N.Y.S.2d 762 (1971) (emotionally disturbed children); avoidance of hazards en route to school, **Shrewsbury v. Board of Education**, 265 S.E.2d 767 (W.Va. 1980); **People ex rel. Schuldt v. Schimanski**, 103 Ill.App.2d 780, 266 N.E.2d 409 (1971); and fulfillment of statutory obligations to provide transportation over certain distances, **Garnet Valley School District v. Hanlon**, 15 Pa.Commw. Ct. 476, 327 A.2d 215 (1975).

In California, courts have ordered student assignment or transportation to fulfill the state constitutional right to a free and equal education, **Manjares v. Newton**, 64 Cal.2d 365, 375, 411 P.2d 901, 49 Cal.Rptr. 805 (1966); the constitutional rights to free expression and due process under an interdistrict attendance agreement, **Myers v. Arcata Union High School District**, 269 Cal. App.2d 549, 75 Cal.Rptr. 68 (1969); the constitutional right to due process in school exclusion proceedings, **Abella v. Riverside Unified School District**, 65 Cal.App.3d 153, 135 Cal.Rptr. 177 (1976); and the statutory right to parental control over corporal punishment, **Burton v. Board of Education**, 71 Cal.App.3d 52, 139 Cal.Rptr. 383 (1977).

state than under federal law. 26/ The

26/ See, e.g., California Supreme Court rulings that rely upon the state equal protection clause to strike down a property tax system of public school financing (**Serrano v. Priest**, 18 Cal.3d 728, 760-68, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); **Serrano v. Priest**, 5 Cal.3d 584, 597-610, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971) (education as a state fundamental interest; wealth as a state suspect classification)); to declare unconstitutional a statute prohibiting women from tending bar except in certain situations (**Sail'er Inn, Inc. v. Kirby**, 5 Cal.3d 1, 17-20, 485 P.2d 529, 95 Cal.Rptr. 329 (1971) (sex as a state suspect classification)); and to enjoin enforcement of state budget act provisions which restricted the circumstances under which public funds could be authorized to pay for abortions for indigent mothers (**Committee to Defend Reproductive Rights v. Myers**, 29 Cal.3d 252, 274-77 n. 22, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) (privacy and right of women to choose whether to bear children as state fundamental rights)); and to accord procedural due process protections independent of the existence of an "'entitlement' that can be defined as 'liberty' or 'property.'" **People v. Ramirez**, 25 Cal.3d 260, 264, 599 P.2d 622, 158 Cal.Rptr. 316 (1979).

See also, **PruneYard Shopping Center** (continued)

fact that this explicit racial barrier is carefully structured not to impede state judicial enforcement of substantive Fourteenth Amendment standards in the school segregation context has no relevance whatever to the racial discrimination that Proposition 1 embeds in California's governmental structure. For it is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case.

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v. Robins, 447 U.S. 74, 81 (1980), aff'g 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979) (State of California may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

Proposition 1 is, therefore, constitutionally indistinguishable from the charter amendment struck down in **Hunter v. Erickson**, 393 U.S. 385 (1969). Even though the Fourteenth Amendment does not require fair housing laws as a remedy for de facto racial discrimination, this Court held that the city could not impose distinctive political burdens upon the establishment or re-institution of such a remedy. Id. at 390-91. See also id. at 395 (Harlan, J., concurring) (a provision that makes it more difficult for minorities to achieve their legislative goals is incompatible with any "neutral principle" of allocating governmental power). Accord, **Lee v. Nyquist**, 402 U.S. 935 (1972), aff'g 318 F.Supp. 710

(W.D. N.Y. 1970) (three-judge court). 27/

The fact that Proposition 1 restricts judicial relief from racial wrongs already condemned by state law while the

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27/ **Lee** struck down a statute creating a single exception, based upon race, to the state's broad supervisory powers over public education. In restricting minority access to judicial remedies for segregation, Proposition 1 also restricts the ability of the state judiciary to afford meaningful relief from unequal educational opportunites that violate the California Constitution. It thus strongly resembles **Lee**.

Cf. **Anderson v. Martin**, 375 U.S. 399 (1964) (state may not inject race into the political process by requiring racial designation on electoral ballot).

This Court has long recognized the necessity for judicial intervention to correct discriminations against racial minorities which deny them equal access to the political process. See **United States v. Carolene Products Co.**, 304 U.S. 144, 152-53 n. 4 (1938). See generally J.H. Ely, Democracy and Distrust 73-104 (1980).

charter amendment invalidated in **Hunter** restricted legislative relief from racial wrongs not yet (or no longer) so condemned makes this case, if anything, a stronger one than **Hunter**. For, as this Court recognized in **NAACP v. Button**, 371 U.S. 415, 430 (1963), "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. 28/

28/ The **Button** court also stated that

> litigation . . . is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country . . . . Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

Id. at 429 (footnote omitted).

Indeed, as the Court more broadly perceived in **Boddie v. Connecticut**, 401 U.S. 371, 375 (1971), "[i]t is to courts . . . that we ultimately look for the implementation of a regularized, orderly process of dispute settlement . . . . Only by providing that the social enforcement mechanism must function strictly within [Fourteenth Amendment] bounds can we hope to maintain an ordered society that is also just." Where, as here, a "judicial proceeding becomes the only effective means of resolving the dispute at hand . . . denial of . . . full access to that process raises grave problems for its legitimacy." Id. at 376. Those problems are exacerbated whenever "denial of full access" is the fate of racial minorities alone, or of persons

seeking to vindicate race-related claims only. Proposition 1 suffers on its face, and as authoritatively construed by the state's responsible authorities and by the courts below, from this fatal constitutional infirmity. At the very least, the racial warp built into the availability of California's judiciary by Proposition 1 should be treated by this Court as an inherently suspect racial classification requiring the strictest scrutiny and demanding the most compelling justification. 29/

29/ See **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 272 (1979) (citations omitted):

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justica-

(continued)

B. Proposition 1 Serves No Compelling Governmental Interest

Because Proposition 1 embodies an explicit racial classification that significantly disadvantages minority students, only a compelling state interest can justify it. Racial classifications may be upheld only where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." **McLaughlin v. Florida**, 379 U.S. 184, 196 (1964) (emphasis added). But California authorities can advance no legitimate, much less compelling, justification for Proposition 1.

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tion. . . . This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

While the court below extolled the reasonableness of "conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment," **Crawford II**, 113 Cal.App.3d at 650, 170 Cal.Rptr. at 506, there can be no suggestion here that the very elimination of race-specific remedies is justified by the supposed virtues of color-blind government in cases such as this, [30] or that the very fact of conforming state to federal protections counts as an independent virtue. [31]

Although the amendment itself lists a number of interests it purports to

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[30] Cf. **Regents of the University of California v. Bakke**, 438 U.S. 265 (1978).

[31] See **PruneYard Shopping Center v. Robins**, 447 U.S. 74 (1980).

serve, 32/ it offers no straightforward justification for the burdens it imposes. It thus tacitly acknowledges that no such necessity exists. Instead, casting about for ostensibly neutral justifications, it provides a mere

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32/ The last paragraph of Proposition 1 states:

> In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectvely available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

laundry list of acceptable social goals, providing no explanation of why minority school children ought to bear special burdens in order to further those goals. Cf. **McLaughlin**, 379 U.S. at 193 (no reason provided for singling out a racial group for unique disadvantages). Moreover, while the constitutional remedies open to racial minorities are impeded to serve this host of other public interests, similar remedies for other groups -- such as handicapped children, who may require special transportation and additional public expenditures to achieve equal educational opportunities -- are not similarly impaired. Indeed, no other group of Californians is forcibly conscripted to serve the public good by relinquishing state equal protection remedies.

If less drastic means exist to serve the public interests asserted to justify an invidious classification, those means must be used instead. See **Memorial Hospital v. Maricopa County**, 415 U.S. 250, 263, 267-68 (1974); **Shapiro v. Thompson**, 394 U.S. 618, 633, 637 (1969). Every one of the interests listed in Proposition 1 could not only be served, but served more effectively, by racially neutral policies.

If student assignment and transportation must be limited to conserve the funds available to finance public education, to save fuel, and to protect the environment, then all school busing programs presumably should be cut back -- not merely those which would integrate formerly segregated minority

schools under court order. 33/ Yet Proposition 1 places no limits whatever on transportation provided to students who live far away from public schools or who encounter particular hazards in traveling to school ("distance" and "hazard" busing, Exh. 550; 69 R.T. 10,025-27), nor -- even more tellingly -- on transportation provided for so-called "voluntary" desegregation programs under which minority students

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33/ Indeed, because of the importance of mandatory reassignment to the fulfillment of a state constitutional right, transportation provided to desegregate minority schools should be the last, not the first, school transportation program sacrificed to the nonconstitutional interests asserted. See **North Carolina Board of Education v. Swann**, 402 U.S. 43, 46 (1971) ("bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it").

may ride school buses to predominantly white schools (Permits With Transportation (PWT)). 34/ Only mandatory reassignment and transportation for desegregation purposes are limited by Proposition 1.

Although Proposition 1 asserts an interest in "maximizing educational opportunities and protecting the health and safety of all public school pupils," it directly restricts the educational opportunities of minority children. A genuine interest in maximizing their educational opportunities would be best served by permitting and encouraging state courts to use all remedies

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34/ Although PWT ostensibly involves students of both races, in practice it has been an overwhelmingly (99% or greater) minority program. J.A. 342-44.

necessary or appropriate to fulfill their state constitutional rights. The health and safety of minority students are not served by requiring them to take lengthy bus rides (in Los Angeles up to 1-1/2 hours each way, J.A. 344; Exh. 363 (E); 84 R.T. 12099) to attend predominantly white schools, while permitting white children to remain in neighborhood schools. Only an equal distribution of transportation burdens for desegregation could fairly serve the health and safety of all children.

Similarly, Proposition 1 cannot equitably "enhanc[e] the ability of parents to participate in the educational process." For minority parents, it offers only a Hobson's choice between sending their children to nearby segregated schools or sending them to

far-away predominantly white schools (if transportation is available). Either way, parental participation in the educational process is not enhanced but constricted -- by distance and by the stigma attached to minority students under a system that singles out one race to bear the burdens of seeking to relieve the effects of segregation, or by the crippling of the educational process that racial segregation causes. See **Crawford**, 17 Cal.3d at 295 & n. 7, 296.

Nor may California "preserve[e] harmony and tranquility in this state and in its public schools" by subjecting racial minorities to unique governmental burdens. "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws . . .

which deny rights created or protected by the Federal Constitution." **Cooper v. Aaron**, 358 U.S. 1, 16 (1958), quoting **Buchanan v. Warley**, 245 U.S. 60, 81 (1917). "A State may not employ an invidious discrimination to sustain the political viability of its programs." **Memorial Hospital**, 415 U.S. at 266.

Analysis of the state interests asserted to justify Proposition 1 thus demonstrates the insubstantiality of their relationship to the burdens inflicted. In fact, the list is no more than threadbare camouflage for the actual interest served by Proposition 1 -- stopping the desegregation of minority segregated schools. That

interest is neither compelling nor legitimate. 35/

II. IN ITS PURPOSE AND EFFECT, PROPOSITION 1 INVIDIOUSLY DISCRIMINATES AGAINST RACIAL MINORITIES

A. Discriminatory Purpose May Be Inferred From the Totality of Relevant Facts

Even if the preceding argument, Part I, supra, were not dispositive,

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35/ Proposition 1's list of interests is also remarkably similar to lists in other cases where school boards have sought unsuccessfully to defeat constitutionally mandated desegregation programs requiring mandatory reassignment. See, e.g., **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1, 28, 29-31 (1971) (remedies for segregation are constitutionally required even if administratively awkward, inconvenient, and even bizarre in some situations"). See also **Lee v. Nyquist**, supra, 318 F.Supp. at 720 (where a statute disadvantages a racial minority in the political process no justification can be sufficient).

Proposition 1 should fall as an invidiously discriminatory measure. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." **Washington v. Davis**, 426 U.S. 229, 242 (1976). Not only does the burdensome impact of Proposition 1 fall principally upon minority students, but all relevant indicia of discriminatory intent establish that the amendment was enacted and adopted in significant part for the discriminatory purpose of reducing integration, or, stated differently, of increasing racial separation. Proposition 1 is thus unconstitutional under the Fourteenth Amendment.

The Constitution proscribes state action intended in any degree to increase racial separation. **Columbus Board of Education v. Penick**, 443 U.S. 449, 456, 464 (1979), see especially id. at 470 (Stewart, J., concurring); **Keyes v. School Disrict No. 1, Denver, Colorado**, 413 U.S. 189, 198 (1973); **Loving v. Virginia**, 388 U.S. 1 (1967); **Brown v. Board of Education**, 347 U.S. 483, 494-95 (1954). Cf. **Reitman v. Mulkey**, 387 U.S. 369, 374 (1967). Because of the nation's racial history, rarely, if ever, will any such purpose be openly and expressly declared. Determination of intent therefore depends upon careful review of the full context of the actions at issue, and reasonable interpretation of the actions' consequences.

In **Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252, 266-68 (1977), this Court identified several factors [36] (without purporting to be exhaustive) for analysis of proof of discriminatory intent. Ascertainment by these criteria that "a discriminatory purpose has been a motivating factor" in a particular decision or act removes any justification for judicial deference. [37] Id. at 265-66 (emphasis

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[36] The factors identified include: the impact of the decision or action at issue, i.e., whether it bears more heavily upon one race than another; the historical background; the specific sequence of events leading to the decision or action; the procedural and substantive departures from the norm in connection with the decision or action; and the legislative or administrative history of the decision or action.

[37] No doubt the racially discriminatory purpose will seldom be the only motivating factor. Particularly with respect to measures as complex and (continued)

added). The burden of proof then shifts to those defending the challenged conduct to "establish that the same decision would have resulted even had the impermissible purpose not been considered." Id. at 270 n. 21.

Of course, no such burden was or could have been discharged here. There is absolutely no affirmative reason to believe, certainly no sufficient basis to find, and no judicial determination to support the view that Proposition 1 would have been adopted independent of the racial considerations underlying

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controversial as Proposition 1, "legislators and administrators are properly cercerned with balancing numerous competing considerations." Id. at 265. Thus, some legislators and voters may have supported the amendment in part because, for example, they favored the neighborhood school concept or entertained various concerns over the use of busing as such.

it. In this case, therefore, the ultimate conclusion of racial discrimination under **Arlington Heights** coincides with the threshold determination that racial considerations played some role in motivating the measure's approval.

B. Racial Considerations Played a Role in the Enactment of Proposition 1

Examination of Proposition 1 in light of the **Arlington Heights** factors requires the conclusion that a racially discriminatory purpose to increase racial separation was not only a motivating factor in the adoption of the

amendment, but in fact was the dominant and pressing force. 38/

38/ The considerations which underlie this Court's insistence upon a showing of motive in cases like **Arlington Heights** themselves support an inquiry more searching here than that in **Arlington Heights** itself. For even if Proposition 1's establishment of a racial classification did not automatically trigger the strictest scrutiny under **Hunter v. Erickson** and **Lee v. Nyquist** (see Part I, supra), the amendment is indisputably not a racially neutral measure -- either in the sense of being wholly independent of race in its text and structure (cf. **Jefferson v. Hackney**, 406 U.S. 535 (1972); **Washington v. Davis**; **Arlington Heights**), or in the sense of using race in a wholly neutral and inconsequential manner. Cf. **Tancil v. Woolls**, 379 U.S. 19 (1964). At the very least, therefore, Proposition 1 should be assessed for racial motivation through an analysis less generous and forgiving than that applied in the series of cases from **Jefferson v. Hackney** through **Memphis v. Greene**, ___ U.S. ___, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981). Expressed otherwise, the racially discriminatory purpose this Court has held indispensable should be more readily pronounced as present in the context of measures such as Proposition 1 whose language and architecture set them apart as at least plausibly (continued)

1. **Impact**

To fix intent, "[t]he impact of the official action - whether it 'bears more heavily on one race than another'" - furnishes "an important starting point." **Arlington Heights**, 429 U.S. at 266. For where the adverse consequences of a law upon a minority are inevitable,

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suspect, than in the context of measures that would appear entirely innocent were one unaware of their differential impact, as a purely statistical matter, upon racial minorities. Cf. **Washington v. Davis**, 426 U.S. at 253-256 (Stevens, J. concurring); **Vlandis v. Kline**, 412 U.S. 441 (1973); **Hampton v. Mow Sun Wong**, 426 U.S. 88 (1976).

This is doubly so where, as here, the only reply of the state's courts to proof of racially discriminatory motive is to find "sufficient answer . . . in the constitutional amendment itself," to dismiss all else as "pure speculation," and to surmise that the "voters who adopted [Proposition 1] could have been motivated without segregative intent and discriminatory purpose . . . ." **Crawford II**, 113 Cal.App.3d at 654-55, 170 Cal.Rptr. at 509 (emphasis added).

"a strong inference that the adverse effects were desired can reasonably be drawn." **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 279 n.15 (1979). See also **Washington v. Davis**, 426 U.S. at 253 (Stevens J. concurring). 39/ Here, it is minority youngsters who sustain the overwhelming

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39/ Justice Stevens observed:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

impact of Proposition 1. 40/ Moreover, even if Proposition 1 applied to court-ordered transportation for purposes other than desegregation, it would still disproportionately affect racial minorities as a group, and racial integration as an aim. For nearly all of the California litigation involving pupil assignment or transportation deals with desegregation.

40/ See Part I, supra. Indeed, prior to passage of Proposition 1 by the state's voters, the California Legislative Analyst had identified the "limit-[ation] [upon] the power of California courts to require desegregation" as the **only** impact of the amendment. See California Ballot Pamphlet, J.A. 260. The Analyst amplified upon this determination by pointing out that the limitation could affect 13 districts already under court order to desegregate, and additional districts that otherwise would become subject to future court decrees.

Proposition 1's prohibition against court-ordered student reassignment is enforceable without regard to whether alternative relief can be implemented, and, more particularly, without regard to whether applying the prohibition will undo an ongoing court-ordered desegregation program that requires pupil transportation to satisfy the state constitutional mandate that minority schools be desegregated. When enforced in the latter situation, the inevitable result of the amendment is therefore resegregation of minority schools. 41/

41/ Thus, in Los Angeles, for example, application of Proposition 1 to undo the mandatory components of the ongoing program caused minority schools which had been desegregated by the plan to become resegregated, and other minority schools which had had their levels of racial isolation substantially reduced to resume their prior levels of racial isolation. See pages A30-A31, (continued)

The racial separation of minority students at these schools necessarily increases. These students are then compelled to attend schools illegally segregated under the California Constitution, 42/ and, as a consequence,

infra. The Superior Court in the trial on review here found upon the evidence presented that mandatory reassignment was a remedy essential to the desegregation of the district's minority schools, J.A. 320-321 and this finding was not overturned by the Court of Appeal. The apparent contrary conclusion, made for the first time at the trial court level on September 10, 1981, may, of course, itself be overturned on appeal. Notice of Appeal from that decision was filed on October 22, 1981.

42/ Resort by some minority students at these schools to voluntary techniques of desegregation in order to attend predominantly white schools will not relieve the adverse impact of Proposition 1 upon minorities. Since the state constitutional objective to be achieved to vindicate minority students' rights remains the desegregation of minority schools, that objective will not be met by one-way transfer of minority pupils to white campuses. Moreover, all-voluntary programs which (continued)

"suffer serious harm. **Crawford I**, 17

rely principally on such one-way transfers have been held to place significant and disproportionate burdens on minorities. This was the specific finding of the trial judge at the trial on review here with respect to the use of voluntary programs in Los Angeles (J.A. 345-46), and this determination was not reversed by the Court of Appeal in **Crawford II**. This ruling was consistent with numerous federal decisions. See, e.g., **Reed v. Rhodes**, 607 F.2d 717 (6th Cir. 1979), aff'g 455 F.Supp. 569, 608 (N.D. Ohio 1978); **NAACP v. Lansing Board of Education**, 559 F.2d 1042, 1059 (6th Cir. 1977), aff'g 429 F.Supp. 583, 620 (W.D. Mich. 1976); **Cisneros v. Corpus Christi Independent School District**, 467 F.2d 142, 153 (5th Cir. 1972); **Martin v. Charlotte-Mecklenburg Board of Education**, 475 F.Supp. 1318, 1340 (W.D.N.C. 1979); **Arthur v. Nyquist**, 473 F.Supp. 830, 839-40 (W.D.N.Y. 1979); **Evans v. Buchanan**, 435 F.Supp. 832, 840 (D.Del. 1977).

See also Poussaint, "Education and Black Self-Image," Freedomways 5 (Fall 1968):

> Since integration is only a one-way street that Negroes travel to a white institution, then an implied inferiority of the Black man is inherent in the situation because it is he who must seek out whites to better his prob-

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Cal.3d at 295. 43/ Even more, termination of existing desegregation programs communicates to minorities an official message that their rights are transitory, to be enjoyed only so long

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lem. This implies that only he can benefit and learn; that he has nothing to offer whites; that whites have nothing to learn from him or his presence.

43/ In addition, the trial court in this case found in 1970, as affirmed in 1976 by the California Surpeme Court, that the "plant, teachers, physical facilities and curriculum" at minority segregated schools in Los Angeles were "in fact of poorer quality than the plant, teachers, physical facilities and curriculm at [the district's] predominanty white schools." J.A. 37; **Crawford I**, 17 Cal.3d at 289. This finding was not affected by the appellate decision in **Crawford II**.

as any individual member of the community chooses not to invoke the amendment. 44/

44/ Cf. **Wright v. Council of City of Emporia**, 407 U.S. 451, 465-66 (1972):

> The timing of Emporia's action is a third factor that was properly taken into account by the District Court in assessing the effect of the action upon children remaining in the county schools. While Emporia long had the right under state law to establish a separate school system, its decision to do so came only upon the basis of -- and, as the city officials conceded, in reaction to -- a court order that prevented that county system from maintaining any longer the segregated system that had lingered for 15 years after **Brown I**. In the words of Judge Winter, dissenting in the Court of Appeals, "[i]f the establishment of an Emporia school district is not enjoined, the black students in the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system." 442 F.2d, at 590. The message of this action,

(continued)

Finally, even where Proposition 1 is invoked not to dismantle an existing plan but to frustrate imposition of a program using mandatory reassignment, its adverse effects are still felt principally by minorities. In districts in which courts would properly find pupil transportation essential to desegregate minority schools, the amendment leaves those schools both undeniably separate and demonstrably

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coming when it did, cannot have escaped the Negro children in the county. As we noted in **Brown I**: "To separate [Negro school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

Cf. **Regents of University of California v. Bakke**, 438 U.S. 265, 391-93 (1978) (Marshall, J., separate opinion).

inferior -- in continued but now irreparable violation of the state's own equal protection clause.

2. Sequence of events

This Court stated in **Arlington Heights**, 429 U.S. at 267, that it would have had "a far different case" if the town had "suddenly" changed the zoning classification of the property there at issue when it learned of the respondent development corporation's plans to erect integrated housing. It is significant, then, that Proposition 1 was enacted by the California Legislature and adopted by the electorate promptly after a desegregation plan was instituted in Los Angeles and, most particularly, after the trial court's panel of experts recommended broadening of that plan into

a metropolitan desegregation program. 45/

The Ballot Pamphlet made clear that this overlap in timing was not coincidential. 46/ Likewise, newspaper reports regarding Proposition 1 described its impetus as deriving from the commencement of desegregation in Los Angeles, and from concerns over the possible imposition of an interdistrict plan. 47/

45/ See pages 15-16, 18-19, supra.

46/ See, e.g., "Arguments in Favor of Proposition 1," "Arguments Against Proposition 1," and "Rebuttal to Argument Against Proposition 1," California Ballot Pamphlet, J.A. 267-79.

47/ The following excerpts from the articles are illustrative:
Richmond Independent, Jan. 14, 1979:

> Another measure to restrict the power of state courts to order schools to integrate has (continued)

begun to move through the Legislature, and supporters think it will pass this time.

The constitutional amendment, aimed primarily at overturning Los Angeles' mandatory busing program, was sent to the Senate floor Wednesday by the upper house's Education Committee.

* * *

This year, supporters are relying on the fear of many Los Angeles-area residents that the Los Angeles plan will spread to nearby districts. They say this fear should give them the votes needed to get the amendment out of the Assembly Judiciary Committee, its stumbling block in past years.

J.A. 201.

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Los Angeles Times, Jan. 18, 1979:

The [Assembly] Committee has killed the Robbins Amendment twice in the past, with [Assemblyman] Imbrecht among those who refused to vote for it. However, since the vote last year, the metropolitan plan has been proposed, and it is conceivable

(continued)

3. Procedural and substantive departures from the norm in connection with the decision or action

"Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." **Arlington Heights**, 429 U.S. at 267 (footnote omitted). The adoption of

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that its adoption could require the busing of students from Imbrecht's district to help integrate Los Angeles schools.

The metropolitan plan, he said, helped him decide that something about busing must be done. Robbins has contended all along that the metropolitan plan has been his most important ally this year.

J.A. 203-04.

Proposition 1 was indeed characterized by exceptional procedural and substantive departures from the norm-departures indicative of its racially discriminatory intent. Pursuant to the normal procedural sequence, Proposition 1, once legislatively enacted, would have been placed before the electorate on the June 1980 ballot. Proponents of the amendment instead sought and obtained legislation authorizing an early special election. 48/

Adoption of Proposition 1 also departed from the procedural norm in that judicial decision-making (e.g., **Jackson, Crawford**) was overridden in a

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48/ See pages 19-20, supra. The proponents also secured unusual special clarifications of Proposition 1 from state officials. See pages 21-22, supra.

state-wide initiative by voters, a large percentage of whom were not personally affected by any ongoing or conceivable plan. See **Seattle School Dist. No. 1, Etc. v. State**, 473 F.Supp. 996, 1016 (W.D. Wash. 1979), aff'd in part and rev'd in part, 633 F.2d 1338 (9th Cir. 1980), prob. jur. noted, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981). The amendment represented a singular effort through the statewide initiative process to upset enforcement of a local judgment, and to deprive successful litigants (petitioners here) of the specific relief they had already won. 49/

49/ Indeed, the tradition in American law has been profound resistance to legislation designed to alter the course of litigation pending on review, cf. **United States v. Klein**, 80 U.S. (13 Wall.) 128 (1871), or designed to undo the result of litigation already concluded. Cf. **Calder v. Bull**, 3 U.S. (3 Dall.) 386 (1798).

Substantively, too, Proposition 1 is remarkable in California: it exists as the only amendment since adoption of the state constitution in 1850 that restricts the autonomy of California courts with respect to an identified subject matter, or constricts their remedial capacity in addressing a particular problem.

More broadly, Proposition 1 severs the link between right and remedy recognized as the "very essence of civil liberty" as long ago as **Marbury v. Madison**, 5 U.S. (1 Cranch) 137, 163 (1803). It thereby represents an extraordinary foreclosure of meaningful access to the courts for vindication of rights substantively secured by the applicable body of law. See, e.g.,

Little v. Streater, ___ U.S. ___, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981); **Boddie v. Connecticut**, 401 U.S. 371 (1971); **Payne v. Superior Court**, 17 Cal.3d 908, 916, 553 P.2d 565, 132 Cal.Rptr. 405 (1976).

Finally, the amendment provision permitting "any interested person " (defined by the Legislative Analyst to mean "any person" J.A. 261) to secure modification of an "existing [state court] judgment, decree, writ, or other order" is unique to California constitutional and statutory law because it places no limit on the persons who may attack such judgments or on the timing or number of challenges that may be brought. 50/ Cf. California Code of

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50/ In the same vein, the amendment requires all courts to give Proposition (continued)

Civil Procedure §§367, 369.

4. Legislative history

Legislative history likewise "may be highly relevant, especially where there are contemporary statements by members of the decision-making body . . . or reports." **Arlington Heights**, 429 U.S. at 268. Thus, the "Analysis by Legislative Analyst" defined the foreseeable consequences of Proposition 1 solely in terms of its restrictive effect upon the

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1 "actions or proceedings first precedence over all other civil actions . . . ." While only a few California statutes have accorded certain actions special precedence over other matters except as to matters granted equal precedence by law, e.g. California Code of Civil Procedure §§1062(a), 1179(a), even fewer statutes and no constitutional amendment previously compelled civil courts to give designated actions superior precedence to all other court business.

power of courts to direct desegregation. J.A. 260.

The Attorney General's clarification of the amendment stated that "[t]he persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 . . . ." J.A. 280. Significantly, this characterization described the opposition to "mandatory busing" only in terms of its use for integration purposes. Were the proponents more broadly opposed to pupil transportation as a technique to remedy any state constitutional or statutory injury, or supportive of the "neighborhood school concept" in all circumstances, their

position would hardly have been so carefully and damagingly limited. 51/

51/ The legislative history of Proposition 1 fits within the amendment's broader historical context. **Arlington Heights**, 429 U.S. at 28. Cf. **Reitman v. Mulkey**, 387 U.S. 369, 373 (1967). As detailed in the Statement of the Case at pages 8-12, Proposition 1 is but the latest, most sophisticated, and most extreme of numerous efforts to defeat integration (particularly when understood to mean desegregation of minority schools in minority communities), and increase racial separation within California.

Moreover, these efforts have always intensified whenever the prospect of integration verged on realization. See note 2, supra, at pp. 10-11. There has been an overall acquiescence in minority rights in the abstract, but fierce resistance to their concrete enforcement.

In Los Angeles, the historical background of Proposition 1 reveals an entire series of actions designed to prevent imposition of court-ordered desegregation. For example, the President of the Los Angeles Board was recalled for what was perceived as his support for pupil transportation to accomplish desegregation. J.A. 247-56. Members of the Board engaged in (continued)

C. The Motivating Role of Race Was Decisive

At trial, only petitioners submitted evidence bearing on the motives animating Proposition 1. Neither the board nor any other party offered any evidence that the amendment was not motivated in part by a racially discriminatory purpose. Similarly, there was no claim (nor any proof supporting any such claim) that the amendment would

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conduct and issued public statements which, as the trial court found, significantly encouraged and exacerbated public opposition to the Board's own 1978 program. J.A. 318, 357-59. Indeed, Board members went so far as to urge the California Supreme Court to stay implementation of its 1978-79 plan, just days before the start of school. J.A. 331-32.

have been enacted even had the impermissible purpose not been considered. 52/

52/ Proof to overcome a shift in burden would have been difficult to adduce in the circumstances of this case. Studies have demonstrated, for example, that white attitudes against busing are most frequently symbolic, and that racial intolerance is the strongest predictor of opposition. See, e.g., D.O. Sears, C.P. Hensler, and L.K. Speer, "Whites' Opposition to Busing: Self-Interest or Symbolic Politics?" 73 American Political Science Review, 139-51 (1980). See also G. Orfield, Must We Bus 116-17 (1978) (studies demonstrate that parents oppose pupil transportation only when transportation is for purposes of school integration).

In contrast with the measures upheld by this Court in the context of welfare distribution (**Jefferson v. Hackney**), employment criteria (**Washington v. Davis**), zoning policy (**Arlington Heights**) and veterans' benefits (**Feeney**), it hardly seems plausible that Proposition 1 would have been approved by California voters (or even proposed by its sponsors) if a bar to pupil transportation had not been regarded as a means to increase racial separation, or (assuming the tables were turned) if pupil transportation had been perceived (continued)

The Superior Court did not inquire into petitioners' evidence. It consequently entered no findings of fact or conclusions of law regarding intent. The court instead held Proposition 1 inapplicable to the case because de jure segregation had been found by the Superior Court in 1970, and affirmed in 1976 by the California Supreme Court. 53/

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as a means to increase racial separation, not to achieve racial integration.

53/ At minimum then, if this Court does not find Proposition 1 unconstitutional, the case should be remanded to the trial court for appropriate findings. Cf. **Columbus Board of Education v. Penick,** 443 U.S. at 457 n. 6 (opinion of the Court) and 469-71 (Stewart, J., concurring); **Dayton Board of Education v. Brinkman,** 443 U.S. 526, 534 n. 8 (1979) **(Dayton II)** (opinion of the Court) and 544 n.* (Rehnquist, J., dissenting; **Dayton Board of Education v. Brinkman,** 433 U.S. 406, 419 (1977) **(Dayton I).**

The Court of Appeal also conducted no evidentiary evaluation of, and made no factual findings about, why Proposition 1 was proposed and approved. Remarkably, it accepted as "sufficient answer" to petitioners' claim concerning the intent of Proposition 1 the amendment's self-contained and self-serving statement of purpose. **Crawford II**, 113 Cal.App.3d at 654, 170 Cal.Rptr. at 509. The court added that efforts to prove impermissible intent constituted "pure speculation," and then asserted its "belie[f]" that Proposition 1 "could have been motivated" by the same considerations expressed by Justice Powell in **Estes v. Metropolitan Branches, Dallas NAACP**, 444 U.S. 437, 450-51 (1981) (dissent from dismissal of writs of certiorari as improvidently

granted). **Crawford II**, 113 Cal.App.3d at 655, 170 Cal.Rptr. at 509. It thus flouted the holdings of **Washington v. Davis**, **Arlington Heights**, and **Feeney**, that where a law is challenged as racially discriminatory in intent, courts must carefully review the evidentiary record to determine whether any such intent existed and, if so, whether the law would have been enacted in the absence of that improper purpose.

Upon an appopriate **Arlington Heights** review of the record made below, both courts should have found that racial discrimination was a decisive motivating factor behind the enactment and adoption of Proposition 1. By any and all of

that decision's criteria, there was evident a constitutionally impermissible intent.

Indeed, the reality is that any other result ought to have been striking. Few persons contend today that opposition to court-ordered desegregation programs like the ones here dismantled or precluded by Proposition 1 is entirely single-minded, that its only motive is racially discriminatory in character. But it would be extraordinary to claim that racial discrimination was wholly immaterial to the decision to enact the amendment at issue here.

CONCLUSION

Extending the substantive protection of state law to racial minorities who

find themselves and their children effectively trapped in separate and unequal schools, California has uniquely hobbled such protection in the single context of race by stripping its courts of remedies often indispensable for coping with segregated education. It is unclear that a state has power under the federal Constitution to extend such "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." **Edwards v. California**, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). But for a state to extend so hollow a guarantee solely to its racial minorities -- while making its judicial apparatus fully meaningful for all others -- is surely to deny such minorities the equal protection of the laws in the most

obvious and axiomatic sense of those terms. Having done so for reasons that were themselves anything but racially neutral, the State of California has doubly offended the Fourteenth Amendment while purporting disingenuously to embrace its terms. The decision permitting that stratagem should not be allowed to stand. Therefore the judgment below should be reversed.

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